and calling card services, (4) agree not to use marketing information to try to win local, intraLATA toll, and calling card services from U S WEST, (5) pay U S West **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** for each residential customer and **[BEGIN PROPRIETARY]** **[END PROPRIETARY]** for every business customer, and (6) give U S WEST discretion whether and to what extent it will market these services. See McMaster Reply Aff. ¶¶ 10-16(citing requirements of Buyer's Advantage); see also Holtz Aff., ¶¶ 3-8 (Exh. 2).

However, the MFJ precedents squarely establish that a BOC unlawfully provides interLATA services when they (1) select a long distance carrier on what the BOC "deems the lowest cost basis," (2) includes this long distance service in a package along with other services and products of the BOC, and (3) markets the long distance and other services "thus assembled" in direct competition with "legitimate interexchange providers." United States v. Western Electric, 627 F. Supp. at 1101. Indeed, contrary to U S WEST's claims, this was the second of the four separate and independent grounds on which the MFJ courts held that BOCs could not offer "shared tenant services" that afford "one-stop shopping." Id. Under this holding, the U S WEST-Qwest alliance is unlawful, irrespective of whether or how U S WEST is separately compensated for the long distance business it generates or whether U S WEST is or could be profiting from the long distance component of the package of services that it is marketing in the way a "reseller" would.

Here, even if it were the case that U S West were not making a nickel off the long distance services that it markets, it is extending monopoly assets only to those long distance carriers that will participate in packages that enable U S WEST to win back other business that it has lost and entrench itself in intraLATA toll, calling card, and other segments of the

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telecommunications industry where it has faced or could later face effective competition. Further, as U S WEST's internal documents state, an **[BEGIN PROPRIETARY]**

[END PROPRIETARY] Qwest Document 392, 393 (Exh. 6)(proprietary). In short, U S WEST is thus not only marketing long distance carrier services, but establishing the rates, terms, and conditions under which interexchange services will be offered, thereby impermissibly "shap[ing] inter-LATA competition to suit its needs." United States v. Western Elec. Co., 583 F. Supp. 1257, 1259 (D.D.C. 1984).

Moreover, U S WEST concedes (at p. 25 n.23) that Shared Tenant Services establishes it cannot participate in long distance services as a "reseller" and that it cannot "profit" from the long distance business it markets. Yet U S WEST is receiving flat fees for each long distance customer it generates and this establishes that it is a reseller of long distance and must be presumed to be profiting from them under the Shared Tenant Services. For in the proposal before the Court, the BOC (Ameritech) would receive a single flat fee covering all the services it marketed and managed, not just the long distance service. As the Justice Department argued, this fact alone would be sufficient to make the BOC a reseller of long distance service.

> "For purposes of decree interpretation a BOC 'must clearly be held to be 'providing' the services it manages.' A person who manages a profitmaking business inevitably will have an incentive to maximize that business's profits. Even to the extent that a management fee is nominally fixed for a given period, the amount of the fee that the manager can expect to receive when a management contract is initially negotiated and when the fee is renegotiated or the contract renewed will inherently be linked to the past and future profitability of the service under its management in comparison to management services offered by others."

United States v. Western Electric, 627 F. Supp. 1090, supra, Response of United States, p. 8 (August 27, 1984).

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> "In short, management of the interexchange aspects of an STS arrangement, including the selection or recommendation of interexchange carriers, the negotiation for and procurement of the selected services, and the subsequent marketing of those interexchange services undertaken as 'agent' for a provider of interexchange services, would involve a BOC in the provision of interexchange services."

Id., p. 10.

The District Court accepted this argument and found that the proposal before it would also impermissibly make the BOC a reseller of long distance service. 627 F.Supp. at 1100. The reason the Justice Department's arguments and the earlier holdings were correct is vividly illustrated by U S WEST's startling assertion that the per customer fees merely recover its marketing "costs." The reality is that any cost calculation includes "cost of capital" ("profit" to a lay person)[6] and even determined public utility commissions have recognized that they cannot limit telephone companies' rates to their "true costs." Here, by contrast, the only check on what U S WEST earns for marketing long distance is Qwest, who has publicly stated that the current charges will allow it to sign up radically more customers than it could ever dream of signing up if it were acting alone and to do so at half its current cost of acquiring new customers. **[Begin Proprietary]**

[End Proprietary]

Further, the documents and Qwest's testimony demonstrate that U S West's claims are a sham and that it is in fact handsomely profiting from the long distance business it generates. As

[6] See First Report and Order, In the Matter of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶¶ 699-700 (1996).

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the responsible Qwest employee has testified, **[Begin Proprietary]**

[End Proprietary] Deposition of Stephen Jacobsen, pp. 41, 73-74 (Exh. 8)(proprietary). And as the U S WEST team leader for Buyer's Advantage conceded, U S WEST insisted on this change to address legal concerns. See Deposition of Kathy Stephens, pp. 95-101 (Exh. 9). This confirms that the relationship has the same, if not greater, potential for profits from the long distance business than U S WEST would enjoy as a reseller. Thus, the U S WEST/Qwest arrangement violates the MFJ because it gives U S WEST a "direct financial interest" in the success of the interexchange services that it offers and allows it to profit from the long distance business in the

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very ways the courts held to be prohibited. United States v. Western Elec. Co., 627 F. Supp. 1090, 1100-01 (D.D.C. 1986).

2. U S WEST's Marketing Scripts and Internal Documents Confirm That It Is Providing InterLATA Services

Further, it is apparent from U S WEST's own submission and its internal documents that it well understands that it is providing interLATA services. Indeed, the point is so clear that is made even in the marketing scripts that were presumably scrubbed carefully to avoid damaging admissions. Not surprisingly, U S WEST's internal documents are even clearer.

Foremost, no amount of scrubbing and wordsmithing could prevent U S WEST from using the term "provide" synonymously with "market" in even its marketing scripts. While most have been carefully edited to leave the impression that U S WEST is providing long distance service without ever quite saying so, one inbound marketing script still states "U S WEST Communications has teamed up with Qwest Communications to provide you and your company long distance services." Parsons Dec., Exh. B-1 (titled "U S WEST's BUYER'S ADVANTAGE") (emphasis added). Indeed, it further goes on to state "Thank you for calling U S WEST Communications, your local, long distance and inter-net provider." Id. (emphasis added). Likewise, a marketing script for outbound marketing to small business customers states "With U S WEST Buyer's Advantage, Qwest and U S WEST are able to provide you with a one stop telecommunications solution . . . ." Id., Exh. B-3 (titled "U S WEST COMMUNICATIONS SGB-US WEST BUYER'S ADVANTAGE VALUABLE CUSTOMERS ("GOLD/SILVER"/COMPETITIVE MSAS") (May 13, 1998) (emphasis added).

The internal documents of U S WEST are even more explicit. **[Begin Proprietary]**

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[End Proprietary] Qwest Document 520 (Exh. 10)(proprietary).

C. The FCC Decisions On Which U S WEST Relies Do Not Support Its Claims -- As Several FCC Commissioners Have Publicly Stated.

Finally, there is no merit to U S WEST's claims that the FCC concluded that the conduct in question either should be or is authorized by the FCC's interpretation of the Act. The Non-Accounting Safeguards and Alarm Monitoring decisions that U S WEST cites are patently irrelevant, and the only pertinent FCC decisions follow the MFJ precedents and thus lend no support to U S WEST.

Indeed, two FCC commissioners have publicly responded to the claims that U S WEST and other BOCs are now advancing, and each has publicly disavowed them. In a statement issued last week, FCC Chairman William Kennard expressly rejected U S WEST's suggestion that prior FCC precedents had addressed the arrangements at issue, stating that the FCC "has not had occasion to evaluate these precise arrangements." Statement of FCC Chairmen William Kennard on U S WEST/Ameritech/Qwest Agreement (May 21, 1998) (attached hereto as Exh. 11). And since then, Commissioner Powell has expressed concern that these teaming arrangements "strain the spirit of the statute in the sense that competition is a precondition for BOCs to enter certain markets."[7] "Commissioner Wants FCC Input in Qwest Deals w/BOCs,"

[7] The statements of these commissioners are a complete response to U S WEST's arguments that the "FCC had approved teaming arrangements like Buyer's Advantage and that the FCC's determination [should be] entitled to deference." U S WEST Br. at 23. Moreover, once a court has fixed the meaning of a statutory provision, as is the case here wit the term "provide," no deference is owed an agency's interpretation of that language. See Lechmere, Inc. v. NLRB, 502 U. S. 527, 536-537.

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Federal Filings Business News (May 26, 1998). These statements reflect the speciousness of U S WEST's claims.

First, the claim that the Non-Accounting Safeguards decision authorized BOCs to market the interLATA services of unaffiliated carriers as part of BOC service packages is meritless. The claim that was raised was whether § 272(g) prohibits (before there is interLATA authority) "teaming" arrangements in which a BOC and an interLATA carrier market their "respective services" to the same customer: e.g., a sales call to a large customer in which a BOC markets its local and other services and in which an interLATA carrier separately markets its interLATA services. 11 FCC Rcd. at 22045. These teaming arrangements often occurred while the MFJ was in effect in situations in which a government body (e.g., GSA) sought to procure all its local and long distance services in a single bid. Consistent with the nondiscrimination requirements, the practice has been that if a BOC participates in a joint sales call or bid with one interLATA carriers, then the BOC must do so with any other interLATA carrier that requests it to do so and must offer each comparable terms for whatever services it wants the BOC to provide. In Non-Accounting Safeguards, all the FCC was asked to decide, and that it decided, was that these teaming arrangements could continue, subject to the nondiscrimination and equal access requirements. Non-Accounting Safeguards, 11 FCC Rcd. at 22047 ("equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization").[8] By contrast, it did not address whether a BOC could now

[8] That the FCC there stated that Section 272(g) is "silent" on the marketing of non-affiliate's services prior to a BOC's receiving interLATA authority is wholly irrelevant, for it simply adopted the position U S WEST has disavowed. See supra. The restrictions on U S WEST's marketing of Qwest's long distance service come do not from Section 272(g)(2). Instead, they come from Section 271(a) (prior to U S WEST's obtaining Section 271 interLATA authority), and, as the FCC explained, from Section 251(g). See id. at 22047.

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do what the MFJ formerly prohibited: marketing one carrier's interLATA services in a package with the BOC's other services.

The Alarm Monitoring decision is even less germane, for it construed a different provision of the Act with a different history and that uses different language.[9] In particular, whereas § 271 codified existing provisions, § 275 reimposed the "alarm monitoring" portions of the information services restriction that courts had found was not necessary to promote competition and that had been vacated. Because of this different history, Congress used different language in § 275 ("engage in the provision of") than in § 271 and § 273 ("provide"). As U S WEST notes, "Congress's use of different language in different sections of the statute should be deemed intentional." U S WEST Br. at 31 n.28 (citing Florida Public Telecommunications Ass'n v. FCC, 54 F.3d 857, 860 (D.C. Cir. 1995)). Here, it gave the FCC discretion not to follow the prevailing interpretations of "provide" in construing the different terms of § 275. By contrast, if the two phrases were nonetheless deemed synonymous, that would establish only that the Alarm Monitoring decision is wrong.

D. In All Events, The Arrangement Patently Violates § 251(g).

While the violation of § 271 is patent, the violation of § 251(g) is even clearer. It expressly codifies as FCC regulations all the provisions of "consent decrees" and "court orders" requiring BOCs to provide equal and non-discriminatory access and interconnection to interexchange carriers. Thus, there is no possible argument that Congress intended to depart from the judicial interpretations of these provisions of the MFJ. And as U S West correctly

[9] U S WEST also cites the FCC's decision in Southwestern Bell Tel. Co.'s Comparably Efficient Interconnection Plan for Security Service, 12 FCC Rcd. 6469 (1997) in support of its position, but that decision simply applies the Alarm Monitoring decision and is therefore equally unavailing.

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states, these provisions impose restrictions and obligations related to all forms of interconnection and access to BOC monopolies (and information about them) and these provisions were construed to require BOCs to be neutral and to provide the same information about all interexchange carriers. They also were held to prohibit BOCs from using their monopoly positions to obtain competitive advantages in even those businesses where the MFJ permitted the BOCs to compete. See United States v. Western Electric, 846 F.2d 1422 (D.C. Cir. 1988).

U S West does not even have a semblance of an argument that its alliance with Qwest is consistent with the requirements of § 251(g). First, while the FCC decisions that U S West cites do not support its § 271 claims, they flatly foreclose any claim that the FCC was there holding that what U S West is now doing satisfies § 251(g). As noted above, whatever the Non-Accounting Safeguards decision could have tacitly held about the consistency of these "teaming" arrangements with § 271, it expressly stated that they had to comply with the separate requirements of § 251(g). And the Alarm Monitoring decision has no possible pertinence to § 251(g), for this statutory section grants rights only to "interexchange carriers" and not to providers of alarm monitoring services.

Thus, U S West is reduced to making arguments about the equal access and nondiscrimination requirements that are flatly foreclosed by the MFJ's terms and the judicial orders under it. In this regard, U S WEST does not and cannot dispute that the Teaming Agreement confers substantial advantages on Qwest. See U S WEST Br. at 26. Rather, U S WEST's primary response to the argument that the Buyer's Advantage program violates the equal access requirements of section 251(g) is to assert that other carriers are free to enter into a similar agreements on the same terms and conditions as Qwest. Id. at 29. Yet, at the same time, U S WEST (incorrectly) argues that § 251(g) "cannot require absolute neutrality." Id., p. 26. U

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S WEST makes this argument because it recognizes that it has used its local monopoly to discriminate in favor of both Qwest (and any other long distance carriers like it) and in favor of U S WEST.

First and foremost, the terms and conditions of the Teaming Agreement discriminate against larger long distance carriers such as AT&T and MCI, in favor of smaller long distance carriers such as Qwest. The essential bargain struck between U S WEST and Qwest -- access to U S WEST's marketing apparatus in exchange for a per-customer fee -- by its very nature contains such a bias. As an established interexchange carrier that has since 1984 successfully marketed long distance services without the aid of a local exchange affiliate, AT&T has at great expense developed an experienced national sales and marketing that it uses to offer services to customers. Qwest, in contrast, has no comparable sales force in place, and it can avoid many of the costs of developing one by entering into a marketing alliance with U S WEST. Indeed, Qwest's CEO has predicted that the Teaming agreement will "cut our customer acquisition costs by 50%." "U S WEST Strikes Marketing Alliance With Q`west in Bold Move Skirting Rules," Wall Street Journal, p. A2 (May 7, 1998) (Exhibit 3 to AT&T's Opening Memorandum of Points and Authorities). Consequently, for its per-customer fee, Qwest receives marketing that is far more valuable to it than it is to AT&T and other well-established interexchange carriers. To avoid discriminatory promotion of Qwest, however, AT&T will be forced to pay the same per-customer fee to U S WEST in exchange for services that would largely replicate its own existing marketing apparatus.

Similarly, Qwest and other smaller carriers receive far greater benefit from association with the U S WEST brand than do larger carriers such as AT&T and MCI. Qwest President and CEO Joseph P. Nacchio has candidly admitted the value of the U S WEST brand to an emerging

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interexchange carrier, stating, "We are delighted to be able, as we are expanding our business, to have a distribution arrangement with a company as credible and as well regarded by their customers as U S WEST, and we think this will lead to a significantly faster penetration. . . ."[10] In contrast, carriers such as AT&T and MCI that already have strong brand recognition and established reputations as providers of quality services do not stand to gain in the same way as Qwest from an affiliation with U S WEST. Nonetheless, merely to avoid overt discrimination in inbound and outbound marketing, AT&T and other interexchange carriers must pay the same per-customer fees to U S WEST that Qwest is now paying.

[Begin proprietary]

[End Proprietary]

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[10] U S Qwest/Qwest Press Conference Transcript, p. 2.

[11] In contrast to interLATA toll calls, intraLATA toll calls are calls that are charged on a per-minute basis but that originate and terminate within the same LATA. For example, a call from Seattle to Tacoma is an intraLATA toll calls. Section 271(a) does not prohibit BOCs from

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Not only has U S WEST discriminated against AT&T by forcing it to take a deal that was specifically designed to benefit smaller carriers like Qwest, U S WEST has discriminated against AT&T by granting Qwest an irreversible "first mover" advantage. As AT&T explained in its Opening Brief, U S WEST has structured the arrangement so that only one carrier will enjoy its benefits for at least a considerable period of time, and that carrier will thereby obtain a critical "first mover" advantage. Qwest's testimony confirms this fact.

U S WEST appears to defend these two types of discrimination on the ground that they are permissible because the discrimination is against larger carriers and in favor of smaller carriers. See U S WEST Br. at 5, 13; Jacobsen Aff., ¶¶ 4-7. But the courts have repeatedly rejected exactly this defense. For example, in United States v. Western Electric Co., 969 F.2d 1231 (D.C. Cir. 1992), the BOCs wanted to violate the MFJ's interLATA restriction and defended their proposal on the ground that it would free smaller carriers from making investments that larger carriers like MCI, Sprint, and AT&T had made. The BOCs argued, "any reduction in the interexchange services competition will be insignificant because many small interexchange carriers cannot afford to install [network control signaling devices] leaving only AT&T and perhaps a couple of other carriers offering [such] services to those areas -- which is hardly the basis for vigorous competition." Id. at 1243. The Court held that this purported justification is per se invalid, for whatever the effect on individual competitors, competition is fostered by having all firms compete on a level playing field and by prohibiting BOCs from using monopolies to confer artificial benefits on small carriers. The court wrote: "To the extent that [the BOCs] contend that the decree should be interpreted to aid the minnows against the trout . . . they are simply wrong." Id.

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providing intraLATA toll calls.

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Likewise, in United States v. Western Electric, 583 F. Supp. 1257 (D.D.C. 1984), a BOC refused to provide AT&T the exchange access necessary to permit AT&T to install coinless pay phones that could be operated with AT&T's calling cards in competition with BOCs and others. It sought to justify its discriminatory refusal in part on the grounds that "companies other than AT&T may not be ready to install their own coinless telephones." 583 F. Supp. at 1260. The MFJ Court, however, found this argument to be "without merit as a matter of law." Id., at 1261. Thus, U S WEST plainly cannot disadvantage AT&T and other established interexchange carriers simply because such discrimination aids other carriers that do not yet have a strong brand or well-developed marketing apparatuses, or that do not derive substantial revenue from intraLATA services.

Further, U S WEST is not merely illicitly discriminating among long distance carriers. It is discriminating in order to favor its own competitive intraLATA toll and calling card service. The only way a long distance carrier can get the benefits of U S WEST's monopoly marketing channels and leverage with customers is to allow its interLATA service to be used to enable U S WEST to take other business (calling card and intraLATA toll) away from interLATA carriers. This epitomizes the discrimination in favor of a BOC's competing services that the Act prohibits. United States v. Western Electric, 846 F.2d 1422 (D.C. Cir. 1988).

U S WEST also suggests that its marketing arrangement with Qwest is consistent with the decisions by the MFJ court defining the scope of the decree's equal access obligations. U S WEST Br. at 28. That is wrong. See AT&T Br. at 18-19; 26-27 (discussing United States v. Western Elec. Co., 698 F. Supp. 348); Shared Tenant Services, supra). Indeed, the MFJ case upon which U S WEST primarily relies -- United States v. Western Elec. Co., 890 F. Supp. 1 (1995) ("Cellular Waiver") -- overwhelmingly supports AT&T's position.

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In Cellular Waiver, the MFJ court granted the BOCs a waiver from the MFJ's requirements so that they could provide limited interexchange services to their cellular customers. In addition to other conditions, it mandated that the BOC "shall not recommend, sell, or otherwise market the interexchange service of any interexchange carrier, and shall administer carrier selection procedures on a carrier-neutral and nondiscriminatory basis." Id. at 12. It further required the long distance sales force to be separate from the from "any sales force that sells products or services" of the BOC;" id., that the long distance sales force receive only the list of BOC customers that competing interexchange carriers receive, id.; and that "the long distance sales force shall not receive any information about the identity of the [BOCs' customers'] interexchange carrier or . . . long distance usage unless the customer is already a customer of the [BOC] interexchange service." Id.

U S WEST is violating each of the foregoing requirements. In addition to the facts discussed above, U S WEST is also discriminating in making confidential customer and carrier information selectively available for Qwest's benefit alone. For example, U S WEST -- like all local telephone monopolies -- maintains the master database of each local customer's chosen long distance carrier. This is information that would be highly useful in telemarketing and, under the Act, is required to be kept confidential and may not be used for U S WEST's "marketing efforts." See 47 U.S.C. § 222(b). However, although U S WEST does not give AT&T or any other carrier access to that information, its marketing scripts reveal that it is now routinely using the information in telemarketing for Buyer's Advantage, with some such scripts beginning with the phrase "I see you have long distance company XYZ on your existing line(s)" right before the U S WEST representative launches into a pitch for Buyer's Advantage. See McMaster Reply Decl., ¶ 25 & McMaster Exhibit F.

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II. U S WEST'S JOINT MARKETING ARRANGEMENT WILL CAUSE IRREPARABLE INJURY TO AT&T, OTHER CARRIERS, AND THE PUBLIC INTEREST

Preliminarily, AT&T is not required to show irreparable harm in order to obtain injunctive relief to enforce the equal access requirements of Section 251(g), because 47 U.S.C. § 401(b) specifically authorizes injunctive relief for that claim. See infra pp. 34-35. The Ninth Circuit has held that where, as here, a "federal statute [] specifically provides for injunctive relief," the "standard requirements for equitable relief need not be satisfied." Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 869 (9th Cir. 1983),[12] and the Seventh Circuit has applied that principle to hold specifically that no showing of irreparable harm is necessary to obtain an injunction under § 401(b). See Illinois Bell Tel. Co. v. FCC, 740 F.2d 566, 571 (7th Cir. 1984).

At any rate, AT&T has clearly established that the U S WEST/Qwest Teaming Agreement will cause irreparable harm to AT&T and other carriers, and to the public interest. As explained in plaintiffs' opening brief and as borne out by the 100,000 customers that have already signed up for the Buyer's Advantage Program, U S WEST's endorsement and marketing of Qwest's long distance service will bestow an artificial competitive advantage on Qwest, which will in turn cause AT&T and other carriers irreparable losses of customers and goodwill. Further, by creating an incentive for U S WEST to discriminate in favor of Qwest in the provision of exchange access services, the Teaming Agreement will impose on AT&T and other carriers immediate and incalculable monitoring costs. In addition, far from creating an

[12] See also See also Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984) ("Where . . . an injunction is authorized by statute and the statutory conditions are satisfied . . . the usual prerequisite of irreparable injury need not be established"); Mical Communications, Inc. v. Sprint Telemedia, Inc., 1 F.3d 1031, 1035 (10th Cir. 1993) (same); Burlington Northern R.R. Co. v. Bair, 957 F.2d 599, 601 (8th Cir. 1992) (same).

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"incentive" for AT&T and other competing local exchange carriers to enter the local market, this Teaming Agreement will reduce U S WEST's incentive to take the steps necessary to open its monopoly local exchange market to competition. U S WEST's contrary arguments are without merit.

A. The Teaming Agreement Causes Irreparable Injury to AT&T and Other Carriers

In the first two weeks of the Buyer's Advantage Program, U S WEST has attracted 100,000 customers to Qwest's long distance service.

Deposition of Kathy Stephens, transcript prepared May 27, 1998, p. 42 (May 27, 1998)(Exh. 9). With each customer lost to the Buyer's Advantage Program, AT&T and other carriers lose the goodwill associated with those customer relationships, in addition to foregone long distance revenue. Contrary to the contentions of U S WEST, these losses are incalculable, irreparable, and wholly sufficient as a matter of law to support entry of a preliminary injunction. See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc., 944 F.2d 597, 602 (9th Cir. 1991); Gateway Eastern Ry Co. v. Terminal R.R. Ass'n, 35 F.3d 1134, 1140 (7th Cir. 1994) ("showing injury to goodwill can constitute irreparable harm that is not compensable by an award of money damages"); Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (finding of irreparable injury proper where "competitive injuries and loss of goodwill are difficult to quantify"). Although U S WEST now chooses to ignore this body of law, it has in the past cited these very cases in recognizing that "harm to a company's relationship with its customers is not readily compensated by damages and hence is irreparable."[13]

[13] U S WEST Motion for Stay Pending Judicial Review, U S WEST Communications v. FCC, Docket No. 97-3576, p. 21, n.18 (8th Cir. Oct. 2, 1997) (citing Gateway Eastern Ry Co. v.

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Although U S WEST cites a host of cases in its effort to claim that AT&T and other carriers' continually increasing competitive injuries are not irreparable, none of the cases cited supports this proposition. As even the portion of Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1316, 1318 (9th Cir. 1995), quoted by U S WEST demonstrates, that case addresses only the question whether financial harm constitutes irreparable injury where "adequate compensatory relief" is otherwise available. See also Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-674 (D.C. Cir. 1985) (stating only that "recoverable monetary loss may not constitute irreparable injury") (emphasis added). Van de Kamp offers no support for the proposition that a plaintiff's loss of goodwill and irretrievable customer losses can be adequately compensated with money damages.[14]

Nor does Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 309 (D.C. Cir. 1985), aid U S WEST. This is not a case in which "customers lost to competition" can be "regained through competition," because AT&T and other carriers are losing customers not through fair competition, but through U S WEST's leveraging of its local monopoly power into the long distance market. Qwest's prediction that its churn rate will decrease by 75% as a

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Terminal R.R. Ass'n, 35 F.3d 1134, 1140 (7th Cir. 1994) and Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992)).

[14] U S WEST's reliance on Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376 (9th Cir. 1985), is similarly misplaced. In that case, the plaintiff effectively conceded that its harm consisted of "purely monetary harm measurable in damages," and the Ninth Circuit, which assumed that harm to reputation could be irreparable, affirmed the district' court's finding of no irreparable injury on the grounds that (i) the defendant's allegedly harmful conduct had been ongoing for several years before plaintiff complained; and (ii) the plaintiff failed to demonstrate that any losses is suffered were in fact caused by defendant's conduct. In sharp contrast, AT&T and the other plaintiffs here have moved immediately to enjoin U S WEST's unlawful Teaming Agreement, and U S WEST has openly acknowledged that its Buyer's Advantage Program has already drawn 100,000 customers away from other carriers and to Qwest.

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result of this alliance is an acknowledgment that customers won through the Buyer's Advantage Program will not simply be recaptured through fair competition.

U S WEST likewise fails to refute that AT&T and other carriers' increased costs of monitoring U S WEST will cause irreparable harm. As discussed in AT&T's opening brief, given its incentive to favor Qwest, U S WEST can engage in precisely the kind of irreparable and subtle access discrimination that led to the MFJ and section 271's continuing restriction on BOC provision of in-region, interLATA services. AT&T Opening Br., pp. 38-41; McMaster Aff., ¶¶ 36-42. U S WEST's primary response to this risk is to state that such costs are "irrelevant" to the preliminary injunction issue because U S WEST should be presumed to comply with its equal access obligations. U S WEST Br. p. 14. This is nonsense. Neither U S WEST's incentive and ability to discriminate, nor AT&T and other carriers' increased monitoring costs, are any less real because U S WEST is theoretically bound by the very equal access obligations it is flouting in this case.[15] And it is precisely because competing carriers cannot be adequately protected through regulation or compensated by litigation that the Bell Operating Companies have been barred from providing long distance services while their local monopolies remain intact.[16]

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[15] Further, U S WEST's arguments that access discrimination is difficult to detect and not technically feasible, see Aguilar Aff., ¶¶ 18-20, are similarly wrong. These arguments simply ignore the numerous subtle and facially neutral means of discrimination available to US WEST. McMaster Aff., ¶¶ 36-42.

[16] In arguing that there is no risk of access discrimination, U S WEST also relies on the Communications Act's requirement that a BOC who has received section 271 authority to provide interLATA services through an affiliate must still comply with equal access obligations, concluding that "Congress plainly believed that a BOC could provide equal access and jointly market service." U S WEST Br., p. 14. This reliance is wholly misplaced. By requiring section 271 approval before a BOC can market the long distance services of its affiliate, "Congress plainly believed" that a BOC "could provide equal access and jointly market service" only after the BOC has dissolved its local exchange monopoly and complied with the market opening requirements of the Act.

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Finally, in an apparent effort to suggest that there is no irreparable harm, U S WEST states (p. 9) that AT&T recently "expressed interest in joining the [Buyer's Advantage] program" and asserts that U S WEST expects to conclude such an agreement with AT&T. That assertion is baseless. AT&T believes such agreements are unlawful. To be sure, AT&T has said that, if its legal views are not accepted on this point and such agreements are not held unlawful, AT&T will have to explore whether it should enter into such agreements with some BOCs too. But having now reviewed the U S WEST/Qwest contract and learned about U S WEST's preconditions, it is crystal clear that AT&T cannot sign that agreement, and that it will continue to suffer irreparable harm from U S WEST's unlawful arrangement with Qwest unless and until U S WEST is enjoined. See McMaster Reply Aff., ¶ 26.

B. The U S WEST/Qwest Teaming Agreement Will Cause Irreparable Harm to the Public Interest.

U S WEST contends that enjoining its teaming agreement with Qwest would "impair the public interest in low-cost competitive services." U S WEST Br. p. 10. However, neither Qwest's nor any other carrier's ability to offer "low-cost competitive services" is dependent upon the unlawful teaming agreement. If this teaming agreement were enjoined, nothing would prohibit Qwest from offering any rate it deems competitive, including the rates it offers through the Buyer's Advantage Program.[17] The alleged "harm" that U S WEST is ultimately complaining about, therefore, can only be that U S WEST will no longer be able artificially to shift long distance customers from larger carriers such as AT&T and MCI (who have earned their competitive positions through investment, time and effort), to the smaller carrier, Qwest. See U S WEST Br. p. 10; see also McMaster Reply Aff. ¶ 29. A program that favors small

[17] Indeed, because Qwest's rates are tariffed at the FCC, even now, any customer can receive the

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interexchange carriers such as Qwest at the expense of larger carriers, however, is not pro-competition -- it is merely pro-Qwest. Such discrimination is no more lawful or benign than any other form of discrimination that generates shifts in market share not through fair competition but through leveraging of a BOC's monopoly asset. See, e.g., United States v. Western Electric Co., 969 F.2d 1231 (D.C. Cir. 1992) ("To the extent that [the BOCs] contend that the decree should be interpreted to aid the minnows against the trout . . . they are simply wrong.").

U S WEST also contends that the Buyer's Advantage Program will accelerate local competition, because long distance carriers will be forced to respond to the U S WEST/Qwest offering with their own bundled packages of local and long distance services. See Crandall Aff., ¶ 18. However, this argument simply ignores the fact that AT&T, MCI and other major interexchange carriers are presently prohibited from engaging in joint marketing of their long distance services and resold local services in U S WEST's region. See 47 U.S.C. § 271(e)(1). In any event, U S WEST is the monopoly provider of local services in its territory, and, in refusing to open its local network to competition, has made any such response impossible. That is one of the reasons the Act requires BOCs to open their local markets before, not after, they begin competing in long-distance.[18]

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rates Qwest offers through Buyer's Advantage without singing up for the whole program.

[18] It is revealing that U S WEST chose Robert Crandall as its witness on this point. Professor Crandall has consistently supported BOC efforts to avoid the interLATA restrictions of section 271. See, e.g., Joint Affidavit of Robert Crandall and Leonard Waverman, In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide in-region, InterLATA Services in Michigan, CC Docket No. 97-137 (1997); Ameritech Michigan Order, FCC Docket No. 97-298, CC Docket 97-137 (Aug. 19, 1997) (denying application). He evidently disagrees with the Act's policy barring the BOCs from the long distance market until they first open their local markets to competition, and he supports U S WEST here on precisely those grounds. Congress -- whose judgment binds -- reached the opposite conclusion when it enacted the Act.

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U S WEST has retained bottleneck control of its local networks, see Ward Reply Aff., ¶ 3, and consequently the overwhelming majority of local service customers in its service territory have no realistic alternative to U S WEST. Further, U S WEST has not come close to satisfying the market-opening requirements of section 271's competitive checklist, as demonstrated by its failure to even apply to the FCC for permission to enter the long distance market. Id., ¶ 2. Instead, it has engaged in conduct that is discriminatory, anticompetitive, and insufficient to support in-region, interLATA entry. Id., ¶¶ 5-10. Indeed, U S WEST has been fined for failing to comply with its contractual duties to turn over critical documents necessary to provide nondiscriminatory access to components of its local networks, and numerous competing local exchange carriers have brought complaints against US WEST for its failure to comply with the market-opening requirements of the Communications Act. See McMaster Aff., ¶ 21; Ward Reply Aff., ¶ 5. No long distance carrier's desire to prevent U S WEST and Qwest from capturing "one stop" shoppers will bring down any of the insurmountable barriers to local competition that U S WEST has erected. To the contrary, by providing U S WEST with many of the benefits of long-distance entry prior to receiving section 271 authority, this Teaming Agreement will only strengthen U S WEST's resolve to keep its local monopoly closed to competition.

Finally, there can be no tenable contention that putative harm to U S WEST should bar an injunction. By arguing that it is only recovering its marketing costs from the Qwest alliance and that the arrangement is "revenue neutral" (Br., p. 8), U S WEST is surely estopped from claiming that preservation of the status quo during the pendency of this lawsuit would cause it any real injury.

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III. The Communications Act Does Not Deprive AT&T of its Right to Injunctive Relief.

Finally, in a transparent effort to distract the Court from the merits of AT&T's claims, U S WEST alleges (p. 30) that "AT&T, as a private party, has no right to obtain injunctive relief." This claim is meritless. AT&T has two private rights of action for injunctive relief: (1) under § 401(b), where no showing of irreparable harm is required, see supra, and (2) under § 206 and the Court's inherent equitable powers, where irreparable harm must be shown.

First, as the District Court in Chicago squarely held, AT&T Corp. v. Ameritech Corp., Order No. 98 C 2993 (N.D. Ill. May 18, 1998), plaintiffs have an explicit right of action under § 401(b) to obtain an injunction to stop U S WEST's ongoing violations of the equal access and nondiscrimination requirements of § 251(g). Section 401(b) expressly provides that "[i]f any person fails or neglects to obey any order of the [FCC] . . . any party injured thereby . . . may apply to the appropriate district court for the enforcement of such order." 47 U.S.C. § 401(b). Because § 401(b) is so clear that private parties may obtain injunctive relief to enforce "orders" of the FCC, U S WEST is compelled to resort to a sleight of hand. U S WEST argues (p. 32) that because § 401(b) speaks of "orders of the Commission" rather than requirements of the Act, AT&T may not obtain injunctive relief because its request for such relief assertedly "relates solely to alleged violations of the TCA itself."

The short and complete answer to this argument is that § 251(g), on which AT&T's claim for injunctive relief is partially based, expressly provides that the MFJ's equal access and nondiscrimination "restrictions and obligations shall be enforceable in the same manner as regulations of the Commission [i.e., the FCC]." As discussed above, § 401(b) of the Act gives private parties a right to obtain federal court injunctions to enforce FCC regulations without showing irreparable harm. Because the equal access and nondiscrimination requirements of § 251(g) are

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"enforceable in the same manner," AT&T has an express private right of action to obtain an injunction against U S WEST's violations of these requirements, irrespective of whether AT&T has shown irreparable harm -- as it has.[19]

Second, plaintiffs also have a right to enjoin U S WEST's violation of § 271 if they demonstrate irreparable harm and satisfy the other prerequisites to the exercise of this Court's equitable jurisdiction. In arguing to the contrary, U S WEST relies (p. 33) on the facts (1) that §§ 206-208 of the Act expressly mention only damages, and (2) that § 401(a) of the Act gives federal district court's jurisdiction, upon application of the Attorney General, to issue "a writ or writs of mandamus" to force any person to comply with any provision of the Act. U S WEST's position is that because Congress expressly provided for private damages remedies and for Government mandamus actions, it somehow denied federal courts jurisdiction to enter an injunction to prevent damages to a private party that cannot be adequately remedied in a future damages award and that are thus irreparable. That is so, in U S WEST's view, even though this case is within the Court's jurisdiction under 28 U.S.C. §§ 1331 & 1337 and under §§ 206- 207 of the Communications Act insofar as plaintiffs seek damages.

This claim is simply wrong. As the Supreme Court has stated in the clearest possible terms, a federal court has the authority to exercise its inherent equitable jurisdiction to enjoin conduct for which there is no adequate damages remedy in any case that is properly before the

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[19] U S WEST does not and could not deny that regulations of the FCC are "orders" for purposes of § 401(b), for the Ninth Circuit has squarely held that plaintiffs may obtain injunctive relief under § 401(b) to enforce FCC requirements that emerge both out of "rulemaking[s]" as well as "adjudicatory proceeding[s]." Hawaiian Tel. Co. v. PUC of Hawaii, 827 F.2d 1264, 1270 (9th Cir. 1986). Remarkably, U S WEST relies on the First Circuit's decision in New England Tel. & Tel. Co. v. Public Utils. Comm'n of Maine, 742 F.2d 1, 5 (1st Cir. 1984) in support of its claim that AT&T may not obtain injunctive relief under § 401(b). But the Ninth Circuit -- whose decisions, unlike those of the First Circuit, are controlling here -- has "[l]ike several other circuit courts, disagree[d] with the First Circuit's reasoning." Hawaiian Telephone, 827 F.2d at 1271.

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court unless Congress has expressly stated otherwise. See Califano v. Yamasaki, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"); Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 70-71 (1992) ("The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute"). U S WEST has plainly failed to make this showing. Indeed, Section 414 of the Act -- entitled "Remedies in this Act not Exclusive" -- provides that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Further, U S WEST's claim is meritless, even apart from § 414.

Sections 206-208 of the Communications Act clearly do not deny federal courts (or the FCC) their inherent power to enter injunctions or other orders that enjoin conduct for which there is no adequate damages remedy. To the contrary, these provisions of the Act establish a private damages remedy only because courts (or the FCC when complaints are brought before it under § 208) otherwise would not have had the clear authority to award damages that they have to grant injunctions. Indeed, rather than suggesting that injunctive relief is somehow unavailable to prevent harm for which there is no adequate damages remedy, §§ 206-208, if anything, indicate that Congress intended that there would be such injunctive remedy. Section 206 directs that a person injured by a common carrier (like U S WEST) is to be made completely whole, for it is entitled to recover the "full amount of damages sustained in consequence of any such violation," plus a "reasonable counsel or attorney fee." 47 U.S.C. § 206. It is inconceivable that the

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Congress that enacted this language could have intended to deny federal courts (or the FCC) the authority to enter injunctions where, as here, a future damages award is inadequate.[20]

CONCLUSION

For the foregoing reasons, and those stated in plaintiffs' initial memorandum, the motion for preliminary injunction should be granted.

DATED this 29th day of May, 1998.

[20] U S WEST's reliance on sections 401(a) and 401(b) has, if anything, even less substance. Section 401(a) gives federal courts the authority on application of the Attorney General to issue writs of mandamus to compel private parties to comply with the Act. Sections 401(a) and § 401(b) (discussed above), if anything, assume that injunctive remedies and other equitable remedies are fully available to prevent violations of the Act, and create an additional extraordinary legal remedy that is available, where applicable, without any showing of the kind of injury that would justify injunctive relief. See supra. That Congress provided for injunctive remedies, even without any showing of irreparable harm, for injuries subject to sections 401(a) and 401(b) simply does not imply that Congress thereby meant to deny the Courts their inherent equitable power to enjoin violations of law where a traditional showing of irreparable harm is made.

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